

FEATURED ARTICLES

Grafton Partners: Juries Make A Comeback

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The Trouble With Juries

Everyone knows that civil jury trials are more trouble than they're worth. They're expensive and time-consuming, and they sometimes lead to unanticipated results. Court administrators don't like them because they take up precious court time and resources. Big companies and their lawyers don't like them because they're expensive and unpredictable. Alternative dispute resolution providers don't like them because they take away business. (More on the problems with juries later.)

One way to avoid problems with jury trials is to agree on mandatory arbitration before a dispute arises. Many contracts, especially those to which big companies are parties, contain such a provision. Effectively, this takes the dispute out of the court system and puts it into the private dispute resolution system. There are a plethora of such providers, from the big ones (such as the American Arbitration Association and the Judicial Arbitration and Mediation Services (JAMS)) to smaller regional and local providers.

These "contractual" arbitration provisions are not only favored by the courts, because they decrease the workload on their dockets, but are also encouraged by private arbitration providers, for whom the arrangement can be lucrative. However, private arbitration, in many cases, has become almost as expensive, unwieldy, and time-consuming as court litigation—with the added drawbacks that the arbitrator need not apply the law, or even common sense, and a bad result is usually not subject to appellate review.

Accordingly, sophisticated parties have used a "third way" that adopts the procedural protections of court proceedings while retaining the economy and speed of private adjudication. This third way is the predispute jury waiver. Through this mechanism, a litigant—often a large company doing business with consumers or employees—may avoid the expense and unpredictability of a jury trial without subjecting itself to the oppressive (and vaguely totalitarian) aspects of a private adjudication system in which one man or woman makes a final, unappealable decision. Until very recently, this system worked well and, in fact, had been endorsed by a court of appeal.

In *Grafton Partners L.P. v Superior Court* (2005) 36 C4th 944, 32 CR3d 5, reported in 28 CEB RPLR 184

(Nov. 2005), the California Supreme Court changed all that.

The Grafton Case: Predispute Jury Waivers Are Unenforceable

How the Dispute Arose

The holding in *Grafton* is fairly straightforward: Predispute jury waivers are unenforceable. How the supreme court got to that conclusion—and what, if anything, can be done about it—are the subjects of this article.

The *Grafton* case involved an engagement letter entered into between an accounting firm, PriceWaterhouseCoopers, and its client, Grafton Partners. The engagement letter contained a provision stating that in the event of differences concerning the services provided or fees charged, both parties "agree not to demand a trial by jury in any action, proceeding or counterclaim arising out of or relating to [those] services and fees for this engagement." 36 C4th at 950.

Three years later, Grafton filed a complaint against PriceWaterhouse alleging negligence, misrepresentation, and related claims based on the alleged failure to disclose—and, indeed, affirmative cover-up of—fraudulent business practices detected in the course of an audit. Grafton Partners demanded a jury trial. The trial court, relying on the waiver language in the engagement letter, granted PriceWaterhouse's motion to strike the jury demand.

Grafton Partners' petition for a writ of mandate followed in the court of appeal, which granted the relief requested, concluding that a predispute waiver of a jury trial is not authorized by CCP §631 (which prescribes the means by which parties to a lawsuit may waive their right to a jury trial) and that only those waivers expressly authorized by statute are enforceable. The California Supreme Court granted review.

The California Constitution and Implementing Legislation

The supreme court started with Cal Const art I, §16:

Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel. In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute.

The last sentence of the constitutional provision—in particular, the words "as prescribed by statute"—was the pivot on which *Grafton* turned.

The statute implementing this constitutional provision is CCP §631, which provides that "[t]he right to a trial by jury as declared by Section 16 of Article I of the California Constitution shall be preserved to the parties invio-

late” and that in civil cases “[a] jury may only be waived pursuant to subdivision (d).” Subdivision(d) provides:

(d) A party waives trial by jury in any of the following ways:

- (1) By failing to appear at the trial.
- (2) By written consent filed with the clerk or judge.
- (3) By oral consent, in open court, entered in the minutes.

(4) By failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation.

(5) By failing to deposit with the clerk, or judge, advance jury fees....

(6) By failing to deposit with the clerk or judge, at the beginning of the second and each succeeding day’s session, [the sum required as jury fees].

The supreme court noted that the constitutional provision and the implementing statute make it plain that the right to a jury is “fundamental” and set forth “in the strongest possible terms.” 36 C4th at 951, 952. To support its premise, the court went through a recitation of California constitutional history, beginning with the California Constitution as originally adopted in 1849, which stated that “[t]he right of trial by jury shall be secured to all, and remain inviolate forever....” Cal Const art I, §3. During the 1878–1879 Constitutional Convention, the court noted, efforts to amend the jury provision to give parties the express power to waive a jury were voted down and the jury waiver provision—including the “prescribed by law” terminology—was reenacted without material change.

The Exline Decision: “Prescribed by Law” Means Express Legislative Provision

The court reviewed one of its own early decisions, *Exline v Smith* (1855) 5 C 112, in which the court considered a statute enacted in 1851 by which the legislature purported to delegate to the court “the power to prescribe by rule what shall be deemed a waiver in other cases.” In *Exline*, the supreme court concluded that the language “prescribed by law” meant that a waiver can be authorized *only* by legislative action, and did not authorize a delegation by the legislature to the courts of the power to determine when a waiver has occurred. The court in *Exline* noted that “[t]he right of trial by jury is too sacred in its character to be frittered away or committed to the uncontrolled caprice of every judge or magistrate in the state.” 5 C at 113.

The *Grafton* court pointed out that since *Exline*, it had disapproved of trial court rules and appellate court decisions creating nonstatutory waivers. It further noted that post-*Exline* efforts to amend the constitution were unsuccessful, and that the convention reenacted the jury waiver provision—including the reference that waiver may occur only as “prescribed by law”—without mate-

rial change. By doing so, the court reasoned, the convention effectively incorporated and adopted *Exline*’s construction of the “prescribed by law” phrase—namely, that it requires expressive legislative provision.

The Trizek Decision: Contractual Jury Waivers Are Enforceable

In 1991, *Trizek Props., Inc. v Superior Court* (1991) 229 CA3d 1616, 280 CR 885, was decided. The *Trizek* decision (which was barely three pages long) involved a jury waiver clause contained in a commercial lease agreement. The *Trizek* court noted that “[t]he majority of jurisdictions have upheld such express contractual waivers.” 229 CA3d at 1618. It further noted that CCP §631 presupposes a pending action at the time that the jury waiver agreement is entered into, and does not apply to an agreement entered into *before* the filing of an action.

Nonetheless, without substantive analysis, the *Trizek* court concluded that the constitution “cannot be read to prohibit individuals from waiving, in advance of any pending action, the right to trial by jury in a civil case.” 229 CA3d at 1618. In support of its holding, the *Trizek* court cited those cases upholding the validity of arbitration agreements in which not only was a jury trial waived, but a forum other than a judicial forum was selected. While acknowledging that the right to trial by jury in a civil case “is a substantial one,” the *Trizek* court noted that, in many commercial transactions, advance jury waivers may “best serve the needs of the contracting parties as well that of our overburdened judicial system.” 229 CA3d at 1619. Accordingly, the *Trizek* court held that the jury waiver provision in the lease agreement was enforceable.

The supreme court in *Grafton* disapproved *Trizek*, noting that it failed to acknowledge the constitutional history and judicial decisions on this topic. It further described as “not persuasive” the *Trizek* court’s analogy to arbitration agreements, since those types of agreements are specifically authorized by statute (CCP §1281).

The Grafton Analysis: Exline Was Right; “Prescribed By Law” Requires Explicit Legislative Authority for a Waiver

The *Grafton* court held that the constitutional provisions preserving the right to a jury trial do not reflect a “neutral” policy on that issue, but rather reflect a public policy that is extremely protective of the right to a jury trial. The court cited prior court of appeal decisions holding that any ambiguity in the statute permitting jury waivers must be resolved in favor of according a litigant a jury trial, and that the right to trial by jury must be “jealously guarded” in the face of a claimed waiver.

The petitioner in *Grafton* argued that CCP §631(d) supported its claim that the contractual agreement for jury waiver was enforceable because it provides for a waiver “by written consent filed with the clerk or

judge.” The *Grafton* court, however, concluded that this language applies only when the consent is given in the context of a *pending* action and the parties have submitted their controversy to a court of law. This is because the statute provides for the waiver of trial by jury by “a party,” which presupposes a pending action. The court invoked the canon of statutory construction known as *noscutur a sociis*, which provides that “the meaning of a word may be ascertained by reference to the meaning of other terms which the Legislature has associated with it in the statute....” 36 C4th at 960 (quoting *People v Rogers* (1971) 5 C3d 129, 142, 95 CR 601 (concurring and dissenting opinion of Mosk, J)). Or, to put it more colloquially, “a word takes meaning from the company it keeps.” 36 C4th at 960 (quoting *People v Jones* (2003) 112 CA4th 341, 354, 4 CR3d 916 (concurring and dissenting opinion of Kolkey, J)). Since §631(d) refers to waivers by “a party,” and since all of the other means of waiver listed in that section apply by their terms only in the context of a pending action (e.g., failing to appear at trial, oral consent in open court, failing to request a jury at trial setting, and failing to deposit jury fees), the provision regarding “written consent filed with the clerk or judge” is reasonably construed as similarly applying only in the context of a pending action.

Nor did the supreme court find persuasive petitioner’s argument that the weight of authority (including New York law) allowed such waivers. The court noted that there were distinguishing features in New York and California law on this subject and, in any event, “this is not the first time we have declined to be guided by the practice in an asserted majority of other jurisdictions—including New York—when interpreting section 631.” 36 C4th at 962.

Petitioner also claimed that not permitting predispute jury waivers would be anomalous, given the authority allowing predispute agreements to arbitrate. The court responded that there is a strong public policy in favor of arbitration expressed in a comprehensive statutory scheme (CCP §§1280–1294.2); there is no similar public policy favoring court trials over jury trials. Moreover, arbitration agreements move disputes entirely out of the judicial context, and therefore more effectively promote the public policy of preserving judicial resources.

In summary, the *Grafton* court concluded that it was for the legislature, not the courts, to determine whether, and under what circumstances, a predispute waiver of a jury trial will be enforceable. Petitioner argued that the court’s decision should apply only prospectively, given the extent to which jury waiver provisions are present in extant contracts. The court disagreed, stating that any reliance on the *Trizek* case as authority for the validity of predispute jury waivers was unwise, given that it is “a single Court of Appeal decision that erroneously [and contrary to the *Exline* case] interpreted our State Constitution....” 36 C4th at 967. The court noted that its deci-

sion would not deny anyone their day in court, but rather would deny to those who had erroneously relied on *Trizek* a benefit to which they were not entitled—that is, a predispute waiver of the right to a jury trial.

Thus, after *Grafton*, waivers of the right to a jury trial given before a dispute arises are no longer enforceable in California. But, as noted by the *Grafton* court (36 C4th at 964):

[A]rbitration (like reference hearings) conserves judicial resources far more than the selection of a court trial over a jury trial. It therefore is rational for the Legislature to promote the use of arbitration and reference hearings by permitting predispute agreements, while not according the same advantages to jury trial waivers.

In reaching this conclusion, and in distinguishing arbitration agreements and reference agreements from the type of jury waiver its opinion addressed, the *Grafton* court identified two potential solutions to the problem the opinion creates—that is, the use of arbitration agreements and reference agreements. In the next two sections of this article, we will address those two alternatives and identify examples of provisions for both an arbitration agreement and a reference agreement.

Alternatives to Jury Waiver Provisions

Arbitration Agreements

Contractual agreements to arbitrate are a tried and true method for agreeing to adjudicate a dispute without a jury—indeed, outside the judicial system. Because of the financial and time expenditures involved in litigation, nonjudicial arbitration has become a highly favored method for resolving disputes. See *Moncharsh v Heilely & Blaise* (1992) 3 C4th 1, 9, 10 CR3d 183. It is now common to find arbitration agreements in all types of contracts, including leases, purchase and sale agreements, and contracts for the sale of goods or services. Arbitration offers benefits to both parties, including the speed and economy of dispute resolution, simplified procedures, and relaxed rules of evidence. With these benefits come some burdens—namely, the lack of the right to appeal the arbitrator’s decision and the absence of any legal requirement that the arbitrator follow the law. Courts have stated that the “very essence” of arbitration is finality, conclusiveness, and avoidance of the uncertainty arising from appealability of the decision of the trier of fact. *Davis v Blue Cross* (1979) 25 C3d 418, 429, 158 CR 828.

California’s current arbitration statute, adopted in 1961, is known as the California Arbitration Act (CCP §§1280–1294.2) The Arbitration Act has been held valid and constitutional, even though an arbitration agreement involves the waiver of the right to a jury trial. *Pratt v Gursej, Schneider & Co.* (2000) 80 CA4th 1105, 1108, 95 CR2d 695. The Federal Arbitration Act (FAA) (9 USC §§1–16), which is beyond the scope of this article, applies to written contracts for the arbitration of disputes

involving interstate commerce. *Blue Cross v Superior Court* (1998) 67 CA4th 42, 47, 78 CR2d 779. Thus, for example, the FAA applies to disputes arising from interstate contracts, including customer accounts at national securities firms, employment agreements, union collective bargaining agreements, and disputes subject to federal diversity jurisdiction. See, e.g., *Allied-Bruce Terminix Cos., Inc. v Dobson* (1995) 513 US 265, 281, 130 L Ed 2d 753, 769, 115 S Ct 834.

The defense of unconscionability has been raised in California courts with respect to arbitration agreements; it requires consideration of two alternative models of analysis, which should lead to the same result:

- If the contract is one of adhesion, enforcement may be denied if the provision falls outside the reasonable expectations of the weaker party, or if the provision is unduly oppressive or unconscionable.
- Any contract may be unenforceable if it is both procedurally and substantively unconscionable. *Ar-mendariz v Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 113, 99 CR2d 745.

There are many examples of courts holding arbitration agreements to be unconscionable, particularly in the context of “adhesion” contracts between consumers or employees and large companies. See, e.g., *Ting v AT&T* (9th Cir 2003) 319 F3d 1126; *Circuit City Stores, Inc. v Adams* (2002) 279 F3d 889; *Villa Milano Homeowners Ass’n v Il Davorge* (2000) 84 CA4th 819, 102 CR2d 1.

The courts have held that the essential elements of an arbitration agreement that waives a party’s right to a judicial resolution of disputes include

- A third-party decision maker;
- A mechanism for insuring neutrality in making the decision;
- A decision maker chosen by the parties;
- An opportunity for both parties to be heard; and
- A binding decision.

See, e.g., *Cheng-Canindin v Renaissance Hotel Assocs.* (1996) 50 CA4th 676, 684, 57 CR2d 867. Except in the case of an agreement to arbitrate the issue of medical malpractice (CCP §1295), certain construction contracts (Bus & P C §7191(c)), health care plans (Health & S C §1363.1), or disputes arising from a real estate contract (CCP §1298(a)), there is no statutory form or required terms for an arbitration agreement. But if an arbitration agreement falls within one of these categories, failure to comply with statutory requirements can be fatal. See, e.g., *Robertson v Health Net, Inc.* (2005) 132 CA4th 1419, 34 CR3d 547, holding that an agreement to arbitrate disputes relating to health care plan was unenforceable due to failure to comply with requirements of Health & S C §1363.1.

As a general rule, unless the agreement is an adhesion contract or ambiguous, a written agreement to arbitrate a future controversy is valid and enforceable without a special waiver of the right to a jury trial or special distinct print to highlight the provision. *Powers v Dixon, Carlson & Campillo* (1997) 54 CA4th 1102, 1110, 63 CR2d 261. Some private arbitration providers have proposed forms of arbitration clauses that appear to work well in practice. See, e.g., JAMS Commercial Clauses (<http://www.jamsadr.com/adrtips/clauses.asp>).

Arbitration provisions contained in real estate contracts—e.g., listing agreements, real property purchase contracts—must be clearly entitled “ARBITRATION OF DISPUTES”; must be set out in at least 8-point bold type or in contrasting red in at least 8-point type; and, if the provisions are included in a typed contract, should be set out in capital letters. CCP §1298(a). Immediately before the line or space provided for the parties to indicate their assent (or nonassent) to such an arbitration provisions, the following must appear, in capital letters and 10-point bold type (or if in contrasting red print, 8-point bold type) if within a printed contract:

NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE ARBITRATION OF DISPUTES PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHT YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE ARBITRATION OF DISPUTES PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.

WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE ARBITRATION OF DISPUTES PROVISION TO NEUTRAL ARBITRATION.

NOTE: Be sure to include an actual agreement to arbitrate with this statutory “warning” language! If you don’t, the statutory language won’t be sufficient to demonstrate an agreement to arbitrate. *Villacreses v Molinari* (2005) 132 CA4th 1223, 34 CR3d 281.

In summary, for those who are willing to live with the drawbacks of private arbitration—namely, lack of legal standards governing the arbitrator’s decision, lack of the right to appellate review, and uneven quality of ar-

biters—contractual agreement to private arbitration is a tried and true method for avoiding exposure to a jury trial through a procedure that is fairly predictable.

Reference Agreements

Code of Civil Procedure §§638–645.1 provide for the appointment of a referee by the court for hearing, determination, and a report back to the court. A general reference occurs when the court, with the parties' consent, directs a referee to try all of the issues in the action. The parties may identify the referee by their agreement, or the referee may be appointed by the court.

Section 638 provides that

[a] referee may be appointed upon the agreement of the parties filed with the clerk, or judge, or entered in the minutes, or upon the motion of a party to a written contract or lease that provides that any controversy arising therefrom shall be heard by a referee if the court finds a reference agreement exists between the parties.

This latter provision by its terms authorizes predispute contractual agreements for the appointment of a referee.

In a general reference, "the referee must prepare a statement of decision which stands as the decision of the court and is reviewable in the same manner as if the court had rendered it." *Sy First Family Ltd. Partnership v Cheung* (1999) 70 CA4th 1334, 1341, 83 CR2d 340. Agreements to appoint a referee have become more commonplace in contracts and have survived challenges to their enforceability.

In the recent case of *Trend Homes, Inc. v Superior Court* (2005) 131 CA4th 950, 32 CR3d 411, a judicial reference agreement was contained in a home purchase contract entered into between Trend Homes and homeowners within a Fresno subdivision. The homeowners filed suit against Trend for allegedly defective construction of their homes. Trend moved to compel a reference with respect to those claims, based on the reference provision contained in the real property purchase contract. The homeowners objected, arguing that the reference agreement was unconscionable and its enforcement could result in a multiplicity of actions.

The court found that such reference agreements were expressly authorized by CCP §§638–645.1. Moreover, the court found that the provisions in question were not unconscionable, either from a procedural or substantive unconscionability standpoint. With respect to procedural unconscionability, the court noted that there was no evidence in the record that the homeowners attempted to negotiate the provision or were prevented from negotiating the provision in question, nor that they lacked any meaningful choice but to agree to the provision. The evidence submitted was simply that the homeowners were never told that the provision was negotiable or could be stricken; this was insufficient to serve as a basis for a finding of procedural unconscionability. There was no evi-

dence that Trend would not have stricken the provision had the real parties objected.

With respect to substantive unconscionability, the court found that the terms of the reference provision were not so one-sided as to "shock the conscience," nor were they harsh or oppressive. The provision did not limit the amount or type of relief that could be obtained, and the provision was reciprocal in that it bound both parties to its terms. Moreover, simply because the provision was silent on the issue of who would bear the cost of the reference did not render the agreement unenforceable.

In the *Trend Homes* case, the homeowners appeared to acknowledge that they could contractually waive their right to a jury trial. (The *Trend Homes* opinion was issued in the same month as the *Grafton Partners* opinion.) However, the homeowners contended that Trend had failed to meet its burden of showing how they would benefit from such a jury waiver. The court noted that the benefit to them was that Trend had similarly waived its right to a jury trial; there was no basis to conclude that the waiver of the right to a jury trial rendered the agreement substantively unconscionable.

Finally, the court noted that by agreeing to a judicial reference, the parties retained "nearly all of their procedural and constitutional rights, since the rules of evidence apply to the proceeding, which is conducted like a trial, and the parties retain appellate rights." 131 CA4th at 964. The only right the parties agreed to give up was the right to a jury trial. Thus, judicial reference does not present the same concerns expressed by other courts with respect to arbitration provisions in terms of the loss of a trial, with its associated procedural and constitutional protections.

Accordingly, the provision was enforceable by its terms. Because it survived an unconscionability challenge, we quote the reference provision in the *Trend* case (131 CA4th at 957):

JUDICIAL REFERENCE.

(A) The parties agree that in any civil action or proceeding involving a dispute arising out of or relating to this agreement, the action or proceeding shall be heard by judicial reference as provided in California Code of Civil Procedure section 638 and 645.1. Disputes arising out of this agreement include, without limitation, the design, planning, engineering, testing, surveying, and construction of improvements to the property; and the disposition of buyer's purchase money deposits.

(B) The parties agree to the employment of a single referee and shall use their best efforts to agree on the selection of the referee. If the parties are unable to agree upon a referee within ten (10) calendar days of a written request to do so by either party, either party may thereafter seek to have a referee appointed under California Code of Civil Procedure section 638 and 640.

(C) The parties agree that the selected or appointed referee shall have the power to decide all issues in the

action or proceeding, whether of fact or of law, and shall report a statement of decision thereon.

(D) By initialing the space below, each party waives any and all rights to a trial by jury for all civil actions or proceedings involving a dispute arising out of or relating to this agreement.

Buyer's Initials () Seller's Initials ()

Two other cases involving challenges to the enforceability of reference agreements are worth mentioning. In *Pardee Constr. Co. v Superior Court* (2002) 100 CA4th 1081, 123 CR2d 288, the court of appeal applied the standards for determining unconscionability of arbitration provisions outlined in *Armendariz, supra*, and determined that a provision in a contractor/developer's standard purchase agreement, used in the sale of individual single-family residences, was unconscionable and unenforceable. That provision called for all construction defect claims to be determined by a general reference to a single referee, without a jury, and for a waiver of all punitive damages.

The next year, in *Woodside Homes, Inc. v Superior Court* (2003) 107 CA4th 723, 132 CA2d 35, the same appellate district held a developer's mandatory judicial reference provision to be enforceable. Again, applying the *Armendariz* standards, the *Woodside Homes* court contrasted *Pardee's* prolix contract, with its "buried" judicial reference provision, to *Woodside's* contract, which was not misleading and had a separately initialed provision captioned "Judicial Reference of Disputes." Thus, only a "low level of procedural unconscionability" was shown, rather than the high level of substantive unconscionability required to upset the reference agreement. 107 CA4th at 730. The court found that a provision for even division of expenses of judicial reference, subject to change in the referee's discretion, was not unconscionable, nor was a waiver of the right to a jury trial obtained by "stealthy device." 107 CA4th at 734.

Although judicial reference provisions can be challenged on unconscionability grounds, such provisions clearly fall outside the scope of the holding in *Grafton Partners*, since reference agreements—including predispute reference agreements—are expressly authorized by statute. Because they retain some of the benefits that arbitration provisions lack (such as a decision conforming to law and subject to appeal), reference agreements are an attractive mechanism to avoid the cost, delay, and possible complexity of a jury trial, while retaining the benefits cited.

California Predispute Jury Waivers in Federal Court—Probably Still Enforceable

The United States Constitution provides for trial by jury in the Seventh Amendment:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury

shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

In addition, certain federal statutes and rules promulgated pursuant to statute may provide a right to jury trial in some cases when the Seventh Amendment does not compel one. (See, e.g., 46 USC App §688 (Jones Act)—injured seaman's right to jury trial in action for injury, despite no constitutional jury right in admiralty cases; FRCP 71A(h)—just compensation issue in eminent domain cases may be jury triable.) The right to a jury trial in the federal courts is determined by federal law, even in diversity cases. *Simler v Conner* (1963) 372 US 221, 222, 9 L Ed 2d 691, 692, 83 S Ct 609.

Under federal law, the right to a jury trial may be waived in advance by an agreement. However, because a fundamental constitutional right is being invoked, the waiver must be both knowing and voluntary. *Medical Air Technol. Corp. v Marwan Inv., Inc.* (1st Cir 2002) 303 F3d 11, 19. Because of the constitutional dimension to a jury waiver, courts will construe such waivers narrowly. *Paracor Fin., Inc. v General Elec. Capital Corp.* (9th Cir 1996) 96 F3d 1151, 1166 n21.

The Ninth Circuit has held that a jury waiver is a contractual right and may be enforced as such. 96 F3d at 1166. Because, as stated above, the right to a jury trial in federal court is to be determined as a matter of federal law in diversity as well as other actions (*Simler, supra*), it is likely that California predispute jury waivers will be enforced in disputes heard in federal court whether federal jurisdiction is based on a federal question or diversity.

Conclusion

We return to where we started: considering the various ways parties may contract away their right to a trial by jury. Although the jury system has been criticized for various real and perceived shortcomings, most trial lawyers would think long and hard before giving up the right to a jury, even in a civil case. Juries tend to bring a "rough justice" calculus and common sensibility to the decision-making process. They may orient their results toward community values; judges, on the other hand, generally choose to follow the law "wherever it goes." Moreover, when the financially or politically powerful including the government are arrayed against a litigant without such clout, a jury can be the great equalizer. For these reasons, among others, the framers of the state constitution saw fit to preserve "inviolable" the right to a trial by jury, and the courts have so jealously protected that right.

Despite the law's predisposition to preserve the jury trial, there are mechanisms for enforcing a predispute waiver of a jury in California, including predispute agreements for arbitration or reference. For a contracting party who wishes to avoid a jury, those are the procedures that should be followed; in addition, those provisions must

be drafted to ensure that they are free from procedural or substantive unconscionability, *i.e.*, make them prominent, even-handed, and reciprocal.